APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-3765

[Filed November 6, 2009]

JOSEPH LAKE, individually and on behalf of all persons similarly situated,
Plaintiff-Appellant,

v.

LANGDON D. NEAL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 07 C 2742—**Robert W. Gettleman,** *Judge.*

ARGUED SEPTEMBER 14, 2009—
DECIDED NOVEMBER 6, 2009

Before EASTERBROOK, *Chief Judge*, and BAUER and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck. Joseph Lake, the plaintiff in

this suit, flunks the *Duck Test*. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck.

The crux of Lake's argument in this appeal is that a voter registration form is actually a motor vehicle record. He argues that the Chicago Board of Election Commissioners (Board) violated the Driver's Privacy Protection Act (DPPA)[1]—which regulates motor vehicle records—by disclosing personal information it obtains from voter registration records that were completed at an office of the Illinois Department of Motor Vehicles (DMV). After a parallel claim in state court was dismissed with prejudice, Lake instituted this class action suit against the Board. Recognizing a fatal flaw in Lake's argument, the district court granted the defendants' motion to dismiss for failure to state a claim.

Because this case comes to us on an appeal from an order granting a motion to dismiss for failure to state a claim, we accept as true all well-pleaded facts alleged, drawing all possible inferences in the plaintiff's favor. *Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 782 (7th Cir. 1999). Here are the facts.

In 1998, Lake applied for a driver's licence at an office of the Illinois DMV. Pursuant to the National Voter Registration Act (NVRA),[2] he exercised an option to register to vote at the same time. He filled out and

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[1] 18 U.S.C. §§ 2721-25.

[2] 42 U.S.C. § 1973.

submitted a voter registration form, which was attached to the driver's license application. The completed voter registration form was transmitted to the Board. In 2007, a fellow named Peter Zelchenko acquired Lake's personal information—he says it was his name, date of birth, sex, address, former address, phone number, and social security number[3]—by simply asking the Board for it. Zelchenko informed Lake that he acquired his personal information from the Board.

Lake raises two issues on appeal, but we need only discuss one: Did his complaint state a cause of action under the DPPA?

The district court dismissed the complaint for failure to state a claim after it determined that a voter registration form filled out at the DMV under the NVRA is not a motor vehicle record under the DPPA. We review grants of motions for failure to state a claim *de novo*. *Hickey v. O'Bannon*, 287 F.3d 656, 657 (7th Cir. 2002).

A bit of background on the two statutes is necessary. The DPPA regulates the ways a DMV can disclose information. Congress passed the DPPA in response to safety and privacy concerns stemming from the ready availability of personal information contained in state motor vehicle records. The most prominent example of the realization of these concerns was the 1989 murder of actress Rebecca Schaeffer, star

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[3] Although we are required to accept as true the facts as pled, we have a hard time believing that the Board, in this day and age, would intentionally release a registered voter's social security number.

of the television series "My Sister Sam." *See* 137 Cong. Rec. 27, 327 (1993). An obsessed fan stalked and killed the actress, in her own apartment, after he obtained her unlisted address from the California DMV. The second statute, the NVRA, allows eligible citizens to register to vote while applying for a driver's license. Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained.

The basis for plaintiff's claim is § 2724 of the DPPA, which creates a private cause of action against "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter . . . ." The DPPA defines a motor vehicle record as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles[.]" The issue for us is whether the voter registration form that Lake filled out at the DMV is a "motor vehicle record" under the DPPA. It qualifies as such only if it "pertains" to one of the documents mentioned in the statute.

The plain language of both statutes makes it clear that a voter registration form filled out pursuant to the NVRA does not "pertain" to any of the listed DMV documents. The dictionary tells us that "pertain" means "to belong as a part, member, accessory, or product."[4] The voter registration form, which is filled out separately and at the applicant's option, is not a

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[4] Merriam-Webster's Collegiate Dictionary (11th ed. 2004).

part, member, accessory, or product of a motor vehicle operator's permit. Other than the fact that it is filled out simultaneously with a driver's license application, the voter form has nothing to do with, nor does it "pertain" to, a motor vehicle operator's permit.

Finally, we would not accept Lake's argument even if a literal interpretation of the DPPA would seem to compel it because that would "lead to an absurd result . . . ." *Castellon-Contreras v. INS*, 45 F.3d 149, 153 (7th Cir. 1995) (citing *Born v. United States*, 498 U.S. 1126 (1991)). The Board receives voter registration forms from a variety of sources. The Illinois DMV, pursuant to the NVRA, is one such source. All voter registration forms contain the same basic information, which the Board must—according to Illinois state law—make available to the public. *See* 10 Ill. Comp. Stat. Ann. 5/6-35 (2009). Accepting Lake's argument would lead to an absurd situation: the Board violates federal law when it discloses the personal information it receives from the DMV pursuant to the NVRA but does not violate federal law when it discloses the same personal information it receives from other sources. This result also likely contravenes the purpose of the NVRA, which is to increase voter registration in federal elections. If it is against federal law for the Board to disclose the voter information it receives from the DMV, but against state law to not make it publicly available, the Board will likely be forced to stop accepting voter registration forms received from the DMV. That would nullify an important purpose of the NVRA.

Since a voter registration form filled out at the DMV is not a motor vehicle record under the DPPA, the Board could not have violated the DPPA by

disclosing Lake's personal information to the extent that it did.

Accordingly, the judgment of the district court is AFFIRMED.

11-6-09

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 C 2742

[Filed September 29, 2008]

JOSEPH LAKE, individually and on behalf of all persons similarly situated,

Plaintiff,

v.

LANDGON NEAL, Chairman; RICHARD COWEN, Secretary; MARISEL A. HERNANDEZ, Commissioner; LANCE GOUGH, Executive Director; MEMBERS AND DIRECTORS, respectively, of the CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants.

Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

Plaintiff Joseph Lake filed a second amended complaint alleging a violation of the Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725 (2007), against the Chicago Board of Election Commissioners (the "Board") and its members, Richard Cowen, Lance Gough, Marisel Hernandez, and Langdon Neal ("Board Members") in their official capacities. Plaintiff's original complaint alleged a civil rights action under 42 U.S.C. § 1983 for violations of the DPPA, the National Voter Registration Act of 1993 ("NVRA"), and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. All that remains of the original complaint is one count alleging a violation of the DPPA. Defendants move to dismiss the action for failure to state a claim upon which relief may be granted pursuant to Fed. Civ. P. 12(b)(6). For the reasons discussed below, the court grants defendants' motion.

FACTS[1]

On or about July 2, 1998, plaintiff applied for a driver's license through the Illinois State Department of Motor Vehicles. Pursuant to the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg-1973gg-10, plaintiff checked a box, which simultaneously registered him to vote in the state of Illinois by sending his information to the Board.

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[1] These facts are taken from plaintiff's complaint and are presumed true for purposes of this motion to dismiss. R.E. Davis Chemical Corp. v. Nalco, 757 F.Supp. 1499, 1505 (N.D. Ill. 1990)

Congress passed the NVRA to increase voter participation in federal elections by making it easier to register to vote. 42 U.S.C. § 1973gg.

In April of 2007, Peter Zelchenko went to the Board to access personal information about plaintiff from plaintiff's voter registration information. Zelchenko had done this on many prior occasions to gain information about voters. The personal information about plaintiff that Zelchenko acquired included his name, date of birth, sex, address, former address, phone number, and social security number. All of this was done without the plaintiff's consent. Zelchenko then used the information to contact plaintiff.

On May 16, 2007, upon learning that Zelchenko obtained his personal information from the Board, the plaintiff instituted this putative class action suit against the individual members of the Board and the Board itself, as well as the Illinois Secretary of State Jesse White. Plaintiff voluntarily dismissed the claim against the Secretary of State.

Before plaintiff brought this action, Zelchenko had filed a putative class action suit in Illinois state court alleging that the Board unlawfully disclosed his personal information. Plaintiff was a member of the putative state class. The instant action was stayed pending resolution of the state court action. The state court action was ultimately dismissed with prejudice. Plaintiff filed a second amended complaint in the instant action. Defendants now move to dismiss plaintiff's action pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

"A suit against individuals in their official capacity working for a local government unit is essentially a suit against the local government unit." Bruce v. South Stickney Sanitary Dist. 2001 WL 968726 at *2 (2001). Therefore, the actions against the individual members of the Board are no different that the action against the Board itself and are dismissed.

In 1994, Congress passed the DPPA in order to protect the privacy of individuals whose information is registered with their local Department of Motor Vehicles. The DPPA provides a private right of action: "[A] person who knowingly obtains, discloses or uses information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States District Court." 18 U.S.C. § 2724(a). Plaintiff alleges that defendants improperly disclosed his personal information in violation of the DPPA.

The NVRA provides that a voter can register simultaneously while receiving or renewing a driver's license. "The purposes of this subchapter are -- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). The NVRA allows a voter to circumvent the process of going directly to the Board to register to vote. The statute provides that, "Each State shall include a voter registration application form for elections for Federal office as *part of* an application for a State motor vehicle driver's license. "42 U.S.C. § 1973gg-3(c)(1) (Emphasis added). Essentially, the DMV takes a

portion of the driver's license application and releases that information to the Board to register the applicant to vote. The information that is released to the Board then becomes a voting record and is wholly independent from a motor vehicle record.

The NVRA states that, "Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law *shall serve as* an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." (Emphasis added) 42 U.S.C. §1973gg-3(1). Plaintiff attempts to define "shall serve as" to mean "to function" or "to act in a particular capacity." Plaintiff argues that a driver's license application used as a voter registration application means that they were intended to be one and the same. The court disagrees. No court has interpreted the DPPA to apply to anything that had such little relation to a Department of Motor Vehicles, and this court declines to do so.

The DPPA clearly defines a motor vehicle record as "any record that pertains to a motor vehicle's operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. § 2725(1). The information that the Board disclosed to Zelchekno meets none of those criteria. Had the plaintiff registered to vote in the normal course, he would not have been entitled to protection based on the DPPA. The only difference in the instant case is that plaintiff chose to register to vote while applying for a driver's license. The information is identical. The DMV

disclosed no more information than was necessary to complete a voter registration form.

In O'Brien v. Quad Six 219 F. Supp. 2d 933, 934, (N.D. Ill. 2002), the court explained Congress's reasoning in passing the DPPA. The statute "seeks to control dissemination of information collected using the coercive power of the state." Id. at 935. The court explained that disclosing information to the department of motor vehicles when applying for a driver's license or permit is "significantly less voluntary" than disclosing information to private businesses or organizations. Id at 934. In the instant case plaintiff repeatedly overlooks the fact that he voluntarily disclosed his personal information to the Board by registering to vote. In doing so he transferred information to the Board to create an entirely new voting record that was, from then on, under the control of the Board. After that, he was not entitled to protection under the DPPA with respect to the information stored and retained by the Board as a voter registration record.

In Mattivi v Russell 2002 WL 31949898 at *2 (D. Colo. Aug 2, 2002), the court decided whether a report obtained from the Colorado State Patrol was a "motor vehicle record" under the DPPA. The court rejected the plaintiff's argument and concluded that the Colorado State Patrol was an agent of the Department of Motor Vehicles, and that the police report was not a motor vehicle record because it was not "issued by a department of motor vehicles." Id at *3.

In the instant case, plaintiff does not even allege that the Board was acting as an agent of the DMV. He is attempting to argue that the voter registration

application is a motor vehicle record. This, as has already been shown, is incorrect. Quite simply, Congress chose to specifically make the DPPA apply to records coming from the DMV and pertaining to a motor vehicle license or permit. Voter registration records are neither.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss for failure to state a claim is granted pursuant to Fed. R. Civ. P. 12 (b)(6).

ENTER: September 29, 2008

/s/Robert W. Gettleman
Robert W. Gettleman
United States District Judge

APPENDIX C

AO 450(Rev. 5/85)Judgment in a Civil Case

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Case Number 07 C 2742

[Filed September 29, 2008]

Joseph Lake, etc.	)
	)
v	)
	)
Landgon Neal, et al	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss the second amended

complaint for failure to state a claim is granted pursuant to Fed. R. Civ. P. 12(b)(6).

Michael W. Dobbins,
Clerk of Court

Date: September 29, 2008 /s/ George Schwemin
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-cv-2742

[Filed December 15, 2009]

JOSEPH LAKE,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LANGDON D. NEAL, et al.,	)
Defendants-Appellees.	)
	)

Before

FRANK H. EASTERBROOK, *Chief Judge*
WILLIAM J. BAUER, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Robert W. Gettleman, *Judge*.

ORDER

On November 20, 2009, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

The National Voter Registration Act of 1993, 42 U.S.C. 1973gg-1973gg-10, but specifically the following provisions:

> (b) Purposes. The purposes of this Act are—
>
> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office[.]

42 U.S.C. 1973gg(b)(1)-1973gg(b)(2).

* * *

National procedures for voter registration for elections for Federal office

> (a) In general. Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office—

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 5[1]

42 U.S.C. 1973gg-2-1973gg-2(a)(1).

* * *

Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general.

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

42 U.S.C. 1973gg3-1973gg3(a)(1).

* * *

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

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[1] 42 U.S.C. 1973gg-3 (2006).

(2) The voter registration application portion of an application for a State motor vehicle driver's license—

(A) may not require any information that duplicates information required in the driver's license portion of the form[.]

42 U.S.C. 1973gg-3(c)(1)-1973gg-(3)(c)(2)(A).

* * *

(d) Change of address. Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

42 U.S.C. 1973gg-3(d).

* * *

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725, enacted as part of the Violent Crime Control and Law Enforcement Act, but specifically the following provisions:

Prohibition on release and use of certain personal information from State motor vehicle records

> (a) In general. A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section[.]

18 U.S.C. 2721-2721(a)(1).

* * *

> (1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;
>
> (2) "person" means an individual, organization or entity, but does not include a State or agency thereof;
>
> (3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information

on vehicular accidents, driving violations, and driver's status.[.]

18 U.S.C. 2725(1)-2725(3).

* * *

(a) Cause of action. A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter [18 USCS §§ 2721, et seq.] shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C. 2724(a).